IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 13-12-1995.

CRIMINAL APPEAL NO. 368 OF 1987

WITH

CRIMINAL APPEAL NO. 370 1987

For Approval and Signature:

THE HON'BLE MR. JUSTICE A.N. DIVECHA

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not ?

3. Whether Their Lordships wish to see the

4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

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Mr. Adil Mehta, Advocate for the appellants.
Mr. S.R. Divetia, Addl. Public Prosecutor for the respondent.

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Coram: A.N. Divecha,J. & H.R. Shelat,J.
(13-12-1995)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

These two appeals are directed against the

judgment and order dated 30th April 1987, passed by the then Additional Sessions Judge, Valsad at Navsari in Sessions Case No.69 of 1986 on his file, whereby both the appellants came to be convicted of the offences under Sections 302 read with Section 34 and 502 Part 2 read with Section 34, and sentenced to life imprisonment for the offence under Section 302 read with Section 34; and fine of Rs.200/-, in default, rigorous imprisonment for 15 days more for the offence under Section 506 Part 2 read with Section 34, Indian Penal Code.

2. The facts in brief leading the appellants to prefer both the appeals are that Chimanbhai Gandabhai Dhodia resides at Sadakpar in Chikhli Taluka of Bulsar District. Babubhai was his son. The appellants are also his sons. Chimanbhai was having the joint properties wherein his sons were having their due share. From Okhra Ramji a land was purchased about years back. In that land Babubhai was demanding his due share but the appellants, his brothers were not willing to give the share. The house in which Babubhai was residing with his family members was running in his name. In that house the appellants were demanding their due share. Thus, with regards to the share in the property there was a dispute amongst the three brothers, namely the appellants and deceased Babubhai. Formerly, Babubhai was doing diamond polishing work at Bombay. On 8th May 1986 he had come back from Bombay. On 30th May 1986 after supper Babubhai, Jasuben his wife and his two sons Shailesh and Jitendra during their leisure hours were talking about the dispute with regard to the partition of the properties and his share therein. Babubhai had expressed his desire to give to the appellants their due share in the house provided in turn the appellants were willing to give his due share in the land. At 00.30 a.m. of 31st May 1986 suddenly the appellants went to the house of Babubhai and abused him stating why he was not giving their share in the house. Deceased Babubhai made it clear that he would be, provided the appellants were willing to give his share in the land. Both the appellants were annoyed and excited. They then threatened that they would kill him so that he would never demand the share. Thereafter, they started to beat deceased Babubhai. At that time Babubhai was on his cot. He was pulled and dragged out of the house. He was made to lie down. Then Ramanbhai one of the appellants, mounted over his chest and pressed his neck by his hand. Babubhai was trying to get rid of the grip. Meanwhile Amrutbhai the other appellant brought a bedsheet and gagged the mouth of deceased Babubhai by stuffing it into the mouth of Babubhai. Both then pressed the neck

forcibly and Amrutbhai pressed his nose. Jasuben shouted for the help. Meanwhile the appellants left the place. Jasuben then went near Babubhai, her husband. She was shocked to know that Babubhai, her husband was no more. At that time the father, the mother and the sister of the deceased were present. Jasuben then went to the Chikhli police station and lodged the complaint in the morning at 6.00 a.m. The police officer of the Chikhli police station started investigation. At the conclusion thereof he filed the chargesheet against both the appellants before the Court of the Judicial Magistrate, First Class at Chikhli. The learned Magistrate at Chikhli was not competent to hear and decide the case of the offence of murder. He therefore committed the case to the Court of Sessions, Bulsar at Navsari for hearing and disposal in accordance with law which came to be numbered as Sessions Case No. 69 of 1986. The then learned Sessions Judge at Navsari assigned the matter to the then Additional Sessions Judge at Navsari for hearing and disposal in accordance with law. The learned Judge below then framed the charge at Exh.3 on 21st February 1987. It was read over and explained to both the appellants. They then pleaded not guilty and claimed to be tried. The prosecution-respondent then led necessary evidence, and at the conclusion of the hearing, the learned Judge below appreciating the evidence and considering the rival submissions reached to the conclusion that the prosecution had beyond reasonable doubt established the charge levelled against both the appellants. He therefore held both the appellants guilty of the offences stated hereinabove and convicted as aforesaid. It is against that order, both the appellants have preferred these two appeals separately challenging the judgment and order of conviction and sentence.

3. As both the appeals arise out of the same judgment and the issues to be decided being common, we, in order to avoid undue consumption of time, duplication of work, hardship to the parties and conflicting judgments, preferred to hear both the appeals together and dispose of the same by a common judgment. Accordingly, both the appeals are heard and by this common judgment both shall stand disposed of.

4. Mr. Adil Mehta, learned Advocate representing both the appellants, contended that the learned Judge below fell into error in appreciating the evidence on record and reached the incorrect conclusions not at all consistent with law. The learned Judge overlooked the discrepancies going to the root of the case. He then took us to the entire evidence on record and pointed out

the errors made by the learned Judge in appreciating the evidence. Mr. Divetia, the learned Additional Public Prosecutor, tried his best to confute, submitting that the learned Judge was perfectly right in appreciating the evidence and holding that the prosecution had succeeded in establishing the charge beyond reasonable doubt. He further submitted that there was no reason for this Court to interfere with the same. Before we proceed, we may mention that for the purpose of convenience,the appellants will be referred to by their names.

5. Amrutbhai Chimanbhai has filed Criminal Appeal No. 368 of 1987 while Ramanbhai has filed Criminal Appeal No. 370 of 1987.

6. The learned Additional Public Prosecutor has urged us to rely upon the evidence of Jasuben (Exh.8), Jitendra Patel (Exh.14), and Revaben Zinabhai Patel (Exh.13) along with the evidence of Mr. B.J. Joshi, the P.S.I., who investigated into the offence. The evidence of the rest of the witnesses is not material as throwing no light on the proposition. If without any comment and searching scrutiny, the evidence is accepted, one would be inclined to agree with the learned Judge below, but the Court cannot ignore the material contradictions or improvements appearing in evidence. We have gone through the evidence of the above stated witnesses with great care. The gashing aspect thereof cannot be overlooked. Jasuben, the widow of the deceased has no doubt supported the case shortly stated hereinabove, but her evidence inspires no confidence. Before the Court, Jasuben has come out with several improvements in the case of the prosecution. On oath before the Court she stated that Amrutbhai and Ramanbhai brought the rope and wrapping the same around the neck of the deceased both tightened it violently, as a result Babubhai her husband died. She has thus altered the case from throttling to strangulation. She has also the audacity to state that Amrut and Raman caused injury on the private part of the deceased, as a result there was profuse bleeding. It may be mentioned at this stage that she has not stated such case before the police while lodging the complaint. She has remained silent before the police while lodging the complaint about the use of the rope and injury on the private part of the deceased. It may also be mentioned at this stage that Dr. P.H. Patel ((Exh.6) while performing the post mortem found no injury on the private part of the deceased; on the contrary the private part was found normal. It is not elucidated by Jasuben why she did not state before the police about the injury on the private part and death by making use of the rope.

Ordinarily, no one would forget to mention this material aspect of the case. While narrating even shortly about the case, one would not miss to state the manner in which the incident happened and especially use of a particular weapon or a thing and bleeding injury on a particular part of the body. When no explanation is offered, it can be assumed that for the reasons best known to Jasuben she has preferred to make serious improvements in her case initially advanced before the police. When the witness has made improvements of a serious nature, her evidence cannot be accepted without independent corroboration.

7. On the Otta outside the house of the deceased, the offence is alleged to have been committed. At one stage Jasuben has stated that because of the profused bleeding from the private part there was a pool of blood on the Otta, but the same was washed out. At another stage, she has stated that, after she came back lodging the complaint the police had been to her place, and at that time from the private part of the deceased blood was coming out. The police also could see it. Let us mention that the Investigating Officer does not support this fact, and certainly he cannot because no injury was found by the Doctor on the private part of the deceased. If at all the police had seen the injury on the private part and blood coming out therefrom, certainly the police would have noted about the same being the important aspect of the case helpful in proving the charge, and removing the doubts that might arise. When the police and the Doctor do not support Jasuben on the point, it is clear that Jasuben is a witness who has the audacity to go to an alarming extent for the purpose of suitably moulding the case and damage the fate of any one. She does not have a sanctity for the truth.

8. Jasuben also states before the Court that she was kicked off and her son was also beaten. She has not narrated such case before the police. Her son Jitendra does not support her so far as she stated about beating to him. According to Jasuben, her father-in-law was present at the time of the incident, and he was provoking Amrutbhai and Ramanbhai; but she has stated nothing about the instigation from her father-in-law before the police while lodging the complaint. In Para 11 of her evidence, Jasuben has admitted that she considers Amrutbhai and Ramanbhai to be her arch-rivals. According to her versions she went to the police station at 1.30 a.m. for lodging the complaint; she narrated her case; but the police did not record the same in writing. The police then went to the place of the incident with her at 2.30 a.m. Thereafter she again went to the police station by

a rickshaw along with the police; but the police denies her such say. According to her, when the police came to the place of the incident, the mouth of the deceased was found gagged; and a rope wrapped around the neck was also shown to the police. At the time of the inquest panchnama the police did not find such condition of the dead body. When such alarming improvements are found in the evidence of Jasuben, it cannot be said that her evidence is free from inherent improbabilities. She is capable to mould her story suitably or brew in order to feather her own nest. Because of enmity generated from the property-dispute, the possibility of her imprecating of Amrut and Raman cannot be ruled out, and for the purpose she may overlay truth with fabrication. Owing to her such tendency we think it unsafe to place sole reliance on the evidence of Jasuben and conclude in favour of the prosecution.

9. Jitendra Babubhai Patel, the son of the deceased has also made an attempt to support the case of the prosecution making necessary statements and has also tried to conform to the evidence of Jasuben. Jitendra has not stated before the police about gagging of the mouth of his father and the bedsheet having been brought by Amrutbhai. He has also not stated before the police about bringing of a rope to the place of the incident. He also remained silent before the police on the fact of both Amrutbhai and Ramanbhai having mounted over the chest of his father. He has also not stated that Ramanbhai wrapped the rope around the neck of his father and both then tightened the same. However he stated all these facts before the Court. According to him when the police came to the scene of offence, there were blood marks on the ground, i.e., on the Otta and the same were pointed out to the police. At the cost of repetition, we may say that the police found no blood mark at the scene of offence. When the incident happened according to this witness, the deceased had put on his half-pant. If the private part of the deceased was injured and because of the injury there was profuse bleeding, certainly the half-pant would be stained with blood and the police would have seized it, but the same is also not seized; and as stated above the Doctor has found no injury on the private part. When this witness is also making alarming improvements in his evidence, he also, being sailing in the same boat as that of his mother, it is not safe to place reliance on his evidence without any independent corroboration.

10. The evidence of Revaben is also not free from doubt. Hearing the shout she rushes to the scene of the

incident. It may be stated that she is residing in the neighbourhood. She has also tried to make such statement which would conform to the case of the prosecution. She also states about use of the rope and the death having been caused by wrapping the rope around the neck and tightening the same. She does not say about the injury on the private part though the above referred two witnesses state about the same. Hearing the shouts her daughter-in-law and her husband had woken up, but she alone went to see and know. After she went back to her house she neither stated to her husband nor to her daughter-in-law, and stealthily went to bed again as if nothing had happened. According to the police officer investigating into the matter, Revaben did not go to him when he visited the place of offence so as to state how the incident had happened. Revaben has thus kept her lips tight for a long time. Her evidence is hence not free from any reasonable suspicion. If the eye witness does not disclose the fact about the offence, and the offender known to him either to the police in time, or to his own nearest family member or of the victim, what can be the value of his evidence was the point raised before the Supreme Court in the case of Madkami Baja vs. The State - 1986 Criminal Law Journal, 433 wherein it is held that if the eye witness does not disclose the occurrence to any one until after commencement of police investigation and no appealing explanation is offered for non-disclosure, the credibility of the witness is certainly impeachable, giving a cause to discard his evidence. Likewise is held by the Bombay High Court in the case of Bhivsan Channau Raikar vs. State of Maharashtra 1989 (3) Crimes, 389. A similar question arose before the Orissa High Court in the case of Ganesh Behera and Ors. vs. State 1990 (1) Crimes 565 wherein also a similar view has been taken. Likewise view is taken by the Supreme Court in the case of State of Karnataka vs. Venkatesh and others - 1992 Criminal Law Journal, 707. The evidence of Revaben therefore cannot be relied upon.

11. The learned A.P.P. submitted that in this case, Jasuben Revaben and Jitendrabhai were supporting each other and when one was supporting the other, it might be held that there was sufficient corroboration. The contention cannot be accepted. It is a well settled principle of law that one infirm cannot support the same brand. In this case, as discussed above, the evidence of each of the three witnesses who have wriggled is not free from doubt and infirmities and their mendacious tendency cannot be overlooked. Hence, even if one supports the other one, it is in fact no support in the eye of law.

The contention therefore cannot be accepted.

12. What transpires from the evidence on record is that, after the post mortem report, every one could know that the death was caused using the rope by wrapping the same around the neck and tightening it. Because of this reason it appears that in order to be consistent with the injuries and possibility of the injuries, the witnesses improved their case and preferred to have departure to the extent necessary from the case initially advanced, or the real truth. In short, the evidence of all the three witnesses on which the prosecution relies much, is nothing but distorted versions after dexterous improvements giving rise to incongruities, and hence prudence dictates insistence on independent evidence which is certainly wanting in this case. In short, the evidence on record does not inspire confidence; on the contrary, it gives rise to many doubts, benefit of which must go to the appellants.

13. Under these circumstances, in our view, the learned Judge fell into error in appreciating evidence of all the three witnesses and placing sole reliance thereon. The evidence appearing fishy, the judgment and order of conviction and sentence cannot be maintained. In the result, both the appeals are required to be allowed, and judgment and order of conviction and sentence passed by the lower Court are required to be quashed. Consequently, both the appeals are hereby allowed. The judgment and order of conviction and sentence passed by the learned Judge below are hereby set aside and both the appellants are acquitted of the same. Both the appellants be set at liberty forthwith if no longer required in any other matter. Fine if paid be refunded.

14. The muddamal be disposed of as per the order of the lower Court.

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